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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	GEN Docket No. 93-252

OPPOSITION COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Pursuant to Sections 1.49, 1.52, 1.415, 1.419, and 1.429 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure,[1] the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits this opposition to the May 19, 1994 requests filed by MCI Telecommunications Corporation ("MCI") and GTE Service Corporation ("GTE") seeking reconsideration of certain aspects of the Commission's April 19, 1994 noticed[2] "Second Report and Order" ("2nd R&O" or "Order") [FCC 94-31], in the above-captioned proceeding.

Specifically, MCI - after correctly noting that the FCC's decision to "refrain" from preempting State regulation of the rates that LECs may charge CMRS providers for intrastate interconnection "is consistent with precedent and the general preservation of

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[1] 47 C.F.R. §§ 1.49, 1.52, 1.415, 1.419, and 1.429 (1993).

[2] 59 Federal Register 18493 (April 19, 1994).

state/federal jurisdiction under OBRA...",[3] - goes on to ask the Commission to "clarify its view that [S]tates may not utilize their lawful authority over the interconnection rates charged by landline telephone companies or over the "other terms and conditions" of CMRS offerings to erect or maintain prohibited barriers to CMRS entry." MCI petition at 14.

GTE wants the commission to basically expand the definition of CMRS service to include enhanced offerings, suggesting in its petition, at page 12, that the FCC clarify that "any service meeting the statutory standard for CMRS will be subject to Title II, even if it might otherwise be considered "enhanced" under Section 64.702 of the rules."

Perhaps the most obvious flaw in both of these vague requests is that they are, at best, premature. In both cases, the companies are asking the FCC to make broad conclusory legal determinations accessing the <u>potential</u> impact of a <u>potentially unlimited variety</u> of <u>existing and possible future</u> state regulations in the abstract - <u>i.e.</u>, with no evidence that such regulations currently exist or will exist in the future. Neither MCI nor GTE provides the Commission with sufficient factual detail to allow an adequate assessment of their requests.

For example, the question of whether an otherwise lawful and nondiscriminatory State regulation that does not directly prohibit entry can be appropriately considered as a barrier to entry under

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[3] An appropriate admission given that the statute only preempts "rates charged by" CMRS providers not rates charged to such carriers for interconnection.

the statute, as well as the related question of whether a regulation actually is an "entry" regulation, cannot be decided in the abstract. Even if the FCC provided the requested clarification, NARUC respectfully suggests that it would provide no enlightenment to either the industry or states as to the "type" of regulation that "might potentially" be prohibited. To the extent that any existing or potential State regulations arise that a CMRS entrant feels qualifies as entry regulation under the statute, the question will be litigated, at least in the first instance, before this Commission. Similarly, the requested GTE clarification, which is also clearly rooted in the possible future existence of inconsistent State regulations affecting intrastate enhanced services, will not provide the States or industry with any guidance.[4]

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[4] Even with the provided clarification, GTE will still have to deal in a service specific context with at least State "other terms and conditions" which can vary from State to State. Moreover, as suggested by our earlier comments concerning CMRS-to-CMRS interconnection rates in our May 19, 1994 Petition for Reconsideration, at 8, NARUC believes generally that, except for basic services rates, enhanced services rate preemption cannot be supported. States are vested, pursuant to 47 U.S.C.A. § 152(b) with exclusive power of intrastate rates, regardless of the type of rate, unless Congress has acted to limit that authority. Although we lack additional insight as to the precise service or services GTE is positing, it does not appear Congress has done so here. Compare, Louisiana Public Service Commission v. FCC, 476 U.S 355, 368, 375 (1986); 47 U.S.C.A. § 201; and In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, 2 FCC Rcd. 2910 (1987) at ¶ 8. A review of the legislative history of the Budget Act, and the tests provided for States to re-enter/continue rate regulation, clearly indicates that Congress intended the preemptive effects of that legislation to apply only to rates charged consumer end-users of basic services.

In any possible GTE scenario involving State regulation, the FCC will first have to make a service specific legal determination as to whether a particular "enhanced service" can even qualify as a CMRS under the statute.

Accordingly, NARUC respectfully requests that the Commission refuse to provide the MCI/GTE requested clarifications discussed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing document was served, by first-class United States mail, postage prepaid, this 8th day of June, 1993, on all parties on the attached Service List.

James Bradford Ramsay
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National Association of
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NARUC's June 8, 1994 Opposition

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